

No. 44856-4

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

MICHAEL FOSS

Appellant,

v

STATE OF WASHINGTON

Respondent.

APPELLANT'S REPLY BRIEF

THURSTON COUNTY SUPERIOR COURT
CAUSE NO. 12-2-00370-7

Appellate Counsel for Plaintiff/Appellant
Michael Foss:

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Appellant replies to the Respondent's Brief as follows:

Reply to argument that "Expert Testimony is Required to Establish The Standard of Care and Causation in a Medical Negligence Case?"

The Legislature did not "overturn" Helling v. Carey, 83 Wn. 2d 514, 519 P.2d 981 (1974).

Indeed, in Gates v. Jensen, 92 Wn. 2d 246, 247, 595 P.2d 919 (1979), our Supreme Court specifically held to the contrary:

"The second question is whether the rule of Helling v. Carey, 83 Wn.2d 514, 519 P.2d 981 (1974), that reasonable prudence may require a standard of care higher than that exercised by the relevant professional group, prevails even after the enactment of RCW 4.24.290. We answer both these questions affirmatively, reverse the trial court, and remand for a new trial."

Plaintiff presented evidence sufficient to infer proximate cause.

Appellant concedes that no doctor said the "magic words", directly linking Plaintiff's glaucoma to his vision loss. However, as noted in Appellant's Brief, it is "not always necessary to prove every element of

causation by medical testimony”. Douglas v. Freeman, 117 Wn2. 242, 255, 1160 (1991). If, “from the facts and circumstances and the medical testimony given”, a reason person can infer causation, the evidence is sufficient. *Id.*

Again, all parties agree that Plaintiffs intraocular pressure came down “right away” with proper treatment. At the very least, he suffered about two weeks of severe eye pain and headaches.

Further, it is undisputed that Plaintiff lost the vision in his right eye from severe intraocular pressure. The only record before the Court of any such high pressure is while he was in the care of the Defendant!

Reply to argument that “Other Reasons Exist To Support The Dismissal By The Trial Court”

Foss’s complaint is timely under the continuing negligence rule.

Respondent appears not to question that the statute of limitations for “continuing” negligence in medical cases runs from the date of the last negligent act.

Foss’s Claim for Damages alleges medical negligence “continuing from December 18th, 2008 through December 23rd, 2008. CP 69-71 (emphasis added). It was received by the State on December 20th, 2011 within three years, and was therefore timely. The Complaint (CP 6-7) alleges negligence continuing from December 20th, 2008 through “at least” December 23rd, 2008.

Respondent is correct that the next date where Appellant was seen, but not treated, was December 24th, not December 23rd. In other words, the Claim form was one day more timely relative to the correct date. The Claim Form obviously put the State on notice of the events in question, in a timely manner.

Reply to argument that “Plaintiff Failed To Provide Notice Of His Claim As Required By RCW 7.70.100 (1)”

McDevitt v. Harborview Medical Center, ___ Wn2d ___, 291 P.3d 876
(2012) was subsequently held to be prospective only, and is therefore not
applicable to this case. McDevitt, 85367-3

CONCLUSION

Plaintiff deserves his day in Court.

DATED this 27 day of June, 2014.

By: 

David A. Williams, WSBA #12010
Attorney for Appellant

PROOF OF SERVICE

I hereby certify that a copy of the Appellant's Reply Brief, was forwarded for service upon the following:

Attorney General of Washington
Robert M. McKenna
Patricia Fetterly
7141 Clearwater Drive SW
Olympia, WA 98504
Attorney for Defendant

Via U.S. Mail
Via Fax

DATED this 27th day of June, 2014.



Lora Perry
Paralegal to David A. Williams